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No. 92-124

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

DCP FARMS, et al., Petitioners

v.

SECRETARY OF AGRICULTURE, et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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Petitioners are compelled to submit this brief Reply in order to address several erroneous statements of law and fact contained in the Brief for the Respondents in Opposition.

1. Respondents assert that "the cases upon which Petitioners rely discuss the distinction between adjudicative and rulemaking, and not the distinction between different stages of adjudicative proceedings." Brief in Opposition at 15. Yet the distinction between adjudicative and rulemaking proceedings is precisely the distinction relied upon by *Pillsbury Co. v. Federal Trade Comm'n*, 354 F.2d 952 (5th Cir. 1966) and its progeny. Significantly, Respondents now abandon the rationale underlying the Fifth Circuit's decision, *i.e.*, that the agency proceeding involved here was not adjudicative in nature. Virtually conceding that the administrative proceeding in the instant case was adjudicative, they assert, instead, that the relevant inquiry is not whether the proceeding was adjudicative, as required by *Pillsbury*, but whether the impermissible Congressional influence was exerted prior to the time when a "formal hearing" was pending. Brief in Opposition at 14, 16.

Respondents' theory, advanced before this Court for the first time, has been rejected by both the Fifth Circuit in *Pillsbury* and the District of Columbia Circuit in *D.C. Fed'n of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), which clearly held the due process standard employed by the District Court should be applied where Congressional interference occurs in the context of agency adjudicative, as opposed to rulemaking, proceedings.[1]

Respondents' assertion that the *Pillsbury* standard applies only when the Congressional interference takes place prior to a "formal hearing" elevates form over substance, would exclude from due process protection a myriad of agency adjudicative proceedings, and would eviscerate over 25 years of Congressional interference jurisprudence.

2. Contrary to Respondents assertion, Petitioners have never claimed that the Department of Agriculture "is not entitled to act on their case at all." Respondents' Brief at 16. The relief sought by Petitioners, and granted by the District Court, simply cures the adverse effect of the constitutional violation and is

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[1] The cases cited by Respondents in support of this novel theory are inapposite. *United States v. Batson*, 782 F.2d 1307, *cert. denied*, 477 U.S. 906 (1986); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Myrick v. City of Dallas*, 810 F.2d 1382 (5th Cir. 1987); and *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984), do not involve allegations of impermissible Congressional interference in an agency adjudicative proceeding. As the Fifth Circuit expressly held in *Pillsbury*, the standards used to determine due process violations based upon Congressional interference are not the same as those applied in cases involving bias or prejudgment by decisionmakers in the absence of such interference. 354 F.2d at 965. Similarly, *Power Authority v. FERC*, 743 F.2d 93 (2d Cir. 1984); *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); and *American Pub. Gas Ass'n v. Federal Power Comm'n*, 567 F.2d 1016, (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978), do not involve efforts by Congressmen to dictate the outcome of an agency administrative proceeding as is the case here.

narrowly tailored to fit both the nature and extent of the violation. The District Court did not make a substantive determination regarding Petitioners' eligibility for federal farm program benefits, but instead deferred that determination to the existing, and long-standing, administrative structure utilized by the USDA. For the 1989 crop year, the District Court simply reinstated the decisions already made by the USDA County ASCS Committees approving Petitioners farm operating plans. For the 1990 and 1991 crop years, the District Court remanded the matter to the County Committees, and limited administrative appeals to the Mississippi State ASCS Committee. The District Court did *not* instruct the County Committees to approve the operating plans.

Under regulations promulgated by the USDA, the County Committees have been given the responsibility of carrying out the programs administered by ASCS. 16 U.S.C. § 590h(b); 7 C.F.R. § 7.21(a); RA 146. Among the specific responsibilities of the County Committees are to make an initial decision regarding a producer's eligibility for benefits under the federal farm payment programs. RA 57. Traditionally, the national level of the USDA has played an extremely limited role in farm program determinations. For example, in Fiscal Year 1987 the ASCS county offices processed 4,037 administrative *appeals* (this number excludes the original determinations which were never appealed), the state offices processed 729 appeals, and the national office processed only 211 appeals. RA 282-84.

Thus, under the relief ordered by the District Court, the impermissible Congressional interference that occurred in this case would be remedied by remanding the matter to those with administrative authority to decide who were untainted by the Congressional interference and unaffected by the threat of legislative retaliation.

3. Finally, Respondents' assertion that Petitioners have failed to show that further administrative proceedings would be

futile because a person other than the decisionmaker subjected to the Congressional interference was designated to serve as a hearing officer at the reconsideration hearing totally mischaracterizes the nature of the adjudicative process at USDA. As the June 1, 1990 determinations themselves made clear, any such reconsideration request in this case would have been made to, and decided by, DASCO itself. RA 69, 73, 76. The hearing officer's role in ASCS administrative appeals is an extremely limited one. Contrary to Respondents' suggestion, it is DASCO, not the ASCS hearing officer, that decides all reconsideration requests of its initial determinations. Christopher R. Kelley and John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Process of ASCS Decisions*, 36 U. S. Dak. L. Rev. 14, n.187 (1991).

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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